Toffoloni v. LFP Publishing Group, LLC
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NORTHERN DIVISION

MAUREEN TOFFOLONI,
as Administrator and Personal Representative of the ESTATE OF NANCY E. BENOIT,

Plaintiff,

vs.

LFP PUBLISHING GROUP, LLC d/b/a Hustler Magazine, MARK SAMANSKY, an individual, and other distributors and sellers of Hustler Magazine, as Defendants X, Y, and Z,

Defendants.

Case No. 1:08-cv-00421-TWT

ANSWER OF DEFENDANT LFP PUBLISHING GROUP, LLC

The Defendant, LFP Publishing Group, LLC, d/b/a Hustler Magazine ("LFP"), for itself and no other Defendant, by its undersigned attorneys, as and for its Answer to the Complaint of Plaintiff Maureen Toffoloni (captioned and filed in the Superior Court of Fayette County, Georgia and removed to this Court), hereby responds to Plaintiff's Complaint as follows:

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Parties, Jurisdiction and Venue

1. LFP is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of the Complaint.

2. Admitted.

3. LFP is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of the Complaint.

4. LFP is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the Complaint.

5. Admitted.

Facts

6. Defendant LFP incorporates by reference all of the prior responses set forth hereinabove in response to the allegations set forth in Paragraphs 1 through 5 of the Complaint.

7. Defendant LFP admits that it publishes *Hustler* magazine 13 times a year, approximately every four weeks, and that much of the content of each monthly magazine is graphic and contains sexual photographs of nude women; Defendant denies each and every other allegation therein contained.

8. Defendant LFP admits the allegations contained in Paragraph 8 of the Complaint, insofar as they assert that Defendant, d/b/a "Hustler Magazine,"

intended to and did publish and sell the March 2008 issue of *Hustler* magazine containing nude and partially nude photographs of Nancy Benoit; denies that *Hustler* intends to publish any other photographs of Nancy Benoit; and denies knowledge or information sufficient to form a belief as to the truth of the allegations that "Exhibit A" contains specified material, since Exhibit A is not attached to the Complaint.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 9 of the Complaint.

10. LFP is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 10 of the Complaint.

11. Admits the allegations contained in Paragraph 11 of the Complaint that Nancy Benoit was aware that she was being videotaped nude for the videotape from which the subject nude photographs of her were apparently extracted; Defendant LFP denies knowledge or information sufficient to form a belief as to the truth of each and every other allegation therein contained.

12. LFP is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 12 of the Complaint.

13. LFP is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 13 of the Complaint.

14. LFP is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 14 of the Complaint.

15. Admits the allegations contained in Paragraph 15 of the Complaint that until Nancy Benoit's untimely death in June, 2007, she "had a career as a model, professional woman wrestler and public figure"; Defendant LFP is without knowledge or information sufficient to form a belief as to the truth of each and every other allegation therein contained.

16. LFP is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16 of the Complaint, except admits that Defendant LFP had possession of the subject photographs of Nancy Benoit when it prepared its March 2008, issue of *Hustler* magazine.

17. Admits the allegations contained in Paragraph 17 of the Complaint that Defendant Samansky conveyed the right to publish his subject photographs of the then-deceased Nancy Benoit to Defendant LFP; Defendant LFP is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained as to what Plaintiff knows about the payment made by LFP to Mark Samansky for permission to publish the subject photos, or whether Ms. Benoit ever gave permission to Mark Samansky to sell the nude photographs of her to third parties.

18. Admits the allegations contained in Paragraph 18 of the Complaint that "Exhibit C" thereof contains a copy of a letter dated June 16, 2008 sent by counsel for Plaintiff to LFP; Defendant denies Plaintiff's characterization of said letter, the terms of which speak for themselves.

19. Admits the allegations contained in Paragraph 19 of the Complaint that by date of January 25, 2008, counsel for Defendant LFP wrote to counsel for Plaintiff, and that a copy thereof is attached to he Complaint as "Exhibit D"; Defendant LFP denies Plaintiff's characterization of said letter, the terms of which speak for themselves.

20. LFP Denies the allegations contained in Paragraph 20 of the Complaint.

21. LFP admits the allegations contained in Paragraph 21 of the Complaint that *Hustler* magazine disseminated and published photographs of Nancy Benoit depicting her nude in its March 2008 issue; Defendant LFP is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained as to publication in "Wrestle Zone" on the internet, or with regard to "Exhibit E" of the Complaint.

Count 1: Petition for Temporary Restraining Order

22. Defendant incorporates by reference its prior responses set forth hereinabove in response to the allegations set forth in Paragraphs 1 through 21 of the Complaint.

23. Denies the allegations contained in Paragraph 23 of the Complaint, except admits the allegations therein contained that once photographs are published, they cannot be unpublished.

24. LFP is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 24 of the Complaint that Plaintiff intends to file a wrongful death action on behalf of the Estate of Nancy Benoit with regard to the murder of Nancy Benoit and her minor son, Daniel Benoit; Defendant LFP denies each and every other allegation contained therein.

25. Denies the allegations contained in Paragraph 25 of the Complaint.

Count 2: Petition For Permanent Injunction

26. Defendant incorporates by reference its prior responses set forth hereinabove in response to the allegations set forth in Paragraphs 1 through 25 of the Complaint.

27. Denies the allegations contained in Paragraph 27 of the Complaint.

28. Denies the allegations contained in Paragraph 27 of the Complaint.

Count 3: Claim For Damages

29. Defendant incorporates by reference its prior responses set forth hereinabove in response to the allegations set forth in Paragraphs 1 through 28 of the Complaint.

30. Denies the allegations contained in Paragraph 30 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

31. Plaintiff's Complaint fails to state a claim upon which relief may be granted against Defendant LFP.

SECOND AFFIRMATIVE DEFENSE

32. As alleged in Paragraph 15 of the Complaint, Plaintiff Toffoloni's Decedent, Nancy Benoit, was a "model, professional woman wrestler and public figure" prior to her untimely murder in 2007.

33. Nancy Benoit voluntarily posed for the lawful, non-obscene nude photographs of her published in the March 2008 issue of *Hustler* magazine that make up the subject matter of this action.

34. The murder of Plaintiff's Decedent Nancy Benoit by her husband (who then committed suicide), was a highly publicized, national news story, covered extensively by the national press, television networks and cable news media.

35. Defendant LFP's publication of the subject nude photographs of Decedent Nancy Benoit was part of a full, two-page article on her life and death in the March 2008 issue of *Hustler* magazine; said article was newsworthy and of interest to *Hustler* magazine's readers.

36. The admitted fact that Nancy Benoit posed for nude photographs as a young woman was a part of her life story, and photographs illustrating how Nancy Benoit posed nude for a photographer were part of a newsworthy story; said photographs were themselves newsworthy.

37. Defendant LFP's publication of the subject nude photographs of Nancy Benoit in the March 2008 issue of *Hustler* magazine were part of the newsworthy exception to the Georgia common law, posthumous right of publicity that makes up the underlying legal basis of this action.

38. By reason of the foregoing, Defendant LFP's publication of the aforesaid nude photographs of Decedent Nancy Benoit does not violate the Georgia common law, posthumous right of publicity.

THIRD AFFIRMATIVE DEFENSE

39. Defendant LFP incorporates by reference Paragraphs 32 through 38 of this Answer as it fully sets forth at length.

40. The publication of voluntarily posed, nude, non-obscene photographs of Decedent public figure Nancy Benoit, whose murder by her husband was national news, as part of Defendant LFP's national magazine article on Decedent's life and death, is a "newsworthy" story protected by the freedom of the press as set forth in the First Amendment to the United States Constitution.

FOURTH AFFIRMATIVE DEFENSE

41. If the publication of voluntarily posed, non-obscene, nude photographs of public figure Decedent Nancy Benoit in an article on her life and death in Defendant LFP's national magazine, after Decedent's murder by her husband became a national news story, is found to violate the Georgia common law posthumous right of publicity, then such a cause of action under said Georgia law would be barred by the right of freedom of the press, as guaranteed by the First Amendment to the United States Constitution, and the Supremacy Clause of the United States Constitution, Article VI, Paragraph 2.

FIFTH AFFIRMATIVE DEFENSE

42. Whether voluntarily posed, non-obscene, nude photographs of public figure Decedent Nancy Benoit, whose murder was a news story covered in detail by the national media, is to be deemed of sufficient interest to the readers of *Hustler* magazine so as to be included in an article therein on Decedent's life and

death, is a decision to be made by *Hustler* magazine's editorial staff and not by the courts.

43. Publication of said lawful photographs of Decedent Nancy Benoit should be shielded from liability under the Georgia common law, posthumous right of publicity under its "newsworthy" exception, and by the freedom of the press guaranteed by the First Amendment to the United States Constitution.

WHEREFORE, Defendant LFP Publishing Group, LLC, demands judgment dismissing the Complaint of Plaintiff Maureen Toffoloni and this action against it; awarding said Defendant its costs and disbursements incurred in the defense of this action; and granting such other and further relief as the Court may deem just and proper.

Respectfully submitted this September 28, 2009.

/s/ S. Derek Bauer
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Attorneys for Defendant
LFP Publishing Group, LLC
d/b/a Hustler Magazine

RULE 7.1(D) CERTIFICATION AND CERTIFICATE OF SERVICE

I hereby certify that the foregoing was prepared in Times New Roman 14 point font in compliance with L.R. 5.1(B).

I hereby certify that a copy of **DEFENDANT LFP PUBLISHING GROUP, LLC'S ANSWER** was served upon counsel for Plaintiff in the above-captioned action through the CM/ECF electronic filing system.

This 28th day of September, 2009.

/s/ S. Derek Bauer
S. Derek Bauer
Georgia Bar No. 042537